

STATE OF MICHIGAN

OCT 2005

IN THE SUPREME COURT

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DIANE CAMERON and JAMES CAMERON,
Co-Guardians of the Estate of Daniel Cameron,

Supreme Court No. 127018

Plaintiffs-Appellants,

Court of Appeals No. 248315

-vs-

Washtenaw County Circuit
Court No. 02-000549-NF

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

BRIEF AS *AMICUS CURIAE* ON BEHALF OF
THE MICHIGAN TRIAL LAWYERS ASSOCIATION

CERTIFICATE OF SERVICE

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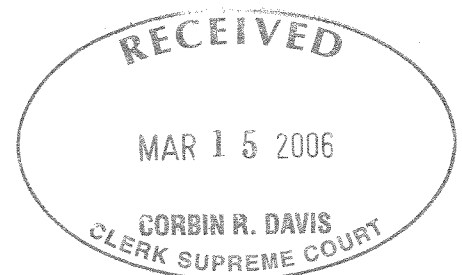


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STATEMENT OF QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT MCL 600.5851 DOES NOT APPLY TO A CAUSE OF ACTION FILED UNDER THE NO-FAULT ACT?

Amicus Curiae, The Michigan Trial Lawyers Association, says “Yes”.

- II. DOES THE TOLLING EFFECT OF MCL 600.5851 APPLY TO THE “ONE YEAR BACK” PROVISION OF MCL 500.3135?

Amicus Curiae, The Michigan Trial Lawyers Association, says “Yes”.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus Curiae, the Michigan Trial Lawyers Association, hereby adopts the Statement of Material Proceedings and Facts contained in the Brief on Appeal filed by plaintiffs-appellants in this Court on July 7, 2005.

The Court heard oral argument on this case on October 18, 2005. On February 2, 2006, the Court issued an order directing the parties and inviting *amici curiae* to file supplemental briefs on the question of “whether the provisions of MCL 600.5851(1) apply to the ‘one year back rule’ of MCL 500.3145(1).”

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE 1993 AMENDMENT TO MCL 600.5851 MADE THE TOLLING PROVISIONS OF THAT STATUTE INAPPLICABLE TO A CAUSE OF ACTION BROUGHT UNDER THE NO-FAULT ACT.

The Michigan Court of Appeals ruled in this case that, based on a 1993 amendment to MCL 600.5851, the tolling principles provided in that statute could not be applied to a cause of action seeking benefits under the no fault act. *Cameron v Auto Club Insurance Association*, 263 Mich App 95; 687 NW2d 354 (2004). The Court of Appeals erred in reaching this result.

The Court of Appeals based its decision on the language contained in MCL 600.5851(1). That subsection provides in pertinent part:

(1) Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or *bring an action under this act* is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

The essence of the Court of Appeals' decision is to be found in the words italicized in the preceding quotation, "bring an action under this act". This phrase was inserted into §5851(1) as part of a 1993 amendment to that statute. The Court of Appeals held that, for either minors or insane persons to qualify for the tolling period allowed by §5851, their cause of action had to be brought "under this act." The "act" referred to in §5851(1) is Michigan's Revised Judicature Act (RJA), MCL 600.101, *et seq.* According to the Court of Appeals, the amended version of §5851(1) does not apply to a cause of action based on the no fault act "because it is not 'an action under [the RJA].'" 263 Mich App at 101. Thus, the Court of Appeals ruled that §5851 is inapplicable to cases such as this one because a cause of action for unpaid first party benefits owed under Michigan's no

fault act is not a cause of action brought under the RJA, but is instead an action brought under the no fault act.

What is immediately obvious from the analysis employed by the Court of Appeals is that the meaning of the words “under this act” in §5851(1) is dependent on the *substantive* basis for the plaintiff’s claim. The plaintiff herein is seeking recovery of no fault benefits. The *substantive* basis for such a claim is the no fault act. Thus, the Court of Appeals reasoned that plaintiff’s cause of action was brought under the no fault act, not under the RJA.

There is, however, one important legal verity which the Court of Appeals overlooked in reaching the conclusion that it did. That fundamental fact is that *the RJA is a procedural act*. The RJA, as this Court has observed, creates no *substantive* causes of action of any kind. *See Sam v Balardo*, 411 Mich 405; 308 NW2d 142 (1981); *Connelly v Paul Ruddy’s Equipment Repair & Service Company*, 388 Mich 146, 151; 200 NW2d 70 (1972). The implication of this fundamental characteristic of the RJA on the Court of Appeals’ decision herein should be obvious.

If, as the Court of Appeals ruled herein, the words “under this act” in §5851(1) are to be defined on the basis of the *substantive* source of the plaintiff’s cause of action, *there is no cause of action which could ever claim the benefit of §5851’s tolling provision*. The reason for this is quite simple. Take the classic case to which §5851’s tolling provision has frequently been applied, a medical malpractice action. Despite considerable legislative inroads into the medical malpractice field over the last fifteen years, the *substantive* basis for a medical malpractice claim is not to be found in the RJA or any other Michigan statute. Instead, the *substantive* basis for a medical malpractice claim is still to be found in Michigan’s common law.

Since the *substantive* basis of a medical malpractice claim is not contained in the RJA, this

means that a common law claim of medical malpractice is no more brought “under the Revised Judicature Act”, than is a cause of action for benefits based on the no fault act. Simply put, if the Court of Appeals’ logic is accepted as true and the words “under this act” in §5851(1) are defined in reference to the *substantive* source of the rights being sued upon, there are *no* cases to which §5851 will apply because the RJA creates no substantive rights. Under the Court of Appeals’ analysis in this case, §5851 does not apply to statutory causes of action found outside the RJA because such claims are not brought “under the RJA”. Moreover, that statute cannot apply to any common law causes of action because, like statutory causes of action to be found elsewhere in the Michigan Compiled Laws, these common law claims are premised on substantive rights which are *not* to be found in the RJA.

The Court of Appeals’ decision in this case is wrong. A rather fundamental principle of statutory interpretation is that a court must avoid any construction of statutory language which would render any part of a statute surplusage or nugatory. *Maskery v Board of Regents*, 468 Mich 609, 618; 664 NW2d 165 (2003); *Brown v Genesee County Board of Commissioners (After Remand)*, 464 Mich 430, 437; 628 NW2d 471 (2001); *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). The decision of the Court of Appeals herein sets a rather dubious record in terms of making statutory language nugatory. That decision, reduced to its basic illogic, has completely eliminated an entire statute since, under the reasoning employed by the Court of Appeals herein, there is no cause of action, based on a statute or common law, which is brought under the RJA.

The error in the analysis employed by the Court of Appeals herein rests in its infusion of the words “bring an action under this act” in §5851(1) with a substantive component. The only appropriate way to read §5851(1) without rendering the entire statute to be without effect is to

recognize that the words “bring an action under this act” are purely procedural in character. Since the Revised Judicature Act is itself procedural in nature, this is the only way in which §5851's tolling provision will not be rendered meaningless.

Thus, the appropriate question to be asked in this case is whether plaintiff's cause of action was *procedurally* brought under the Revised Judicature Act. From a *procedural* perspective, there is no doubt that this cause of action was brought under the Revised Judicature Act. See MCL 600.1901. The error in the Court of Appeals' analysis is, interestingly, highlighted in an observation contained in that Court's own opinion. In its July 13, 2004, decision the Court of Appeals examined the text of §5851 and came to the following conclusion: “The language of the savings provision clearly and unambiguously states that it now applies only to causes of action *commenced under the RJA*.” *Cameron*, 263 Mich App at 100. The word “commenced”, like the word “filed” or the word which is actually used in §5851(1), “bring”, denotes the procedural act of *instituting* a cause of action. It is not, as the *Cameron* Court ultimately concluded, a reference to the underlying substantive basis for the cause of action. This cause of action was unquestionably *commenced* under the RJA.

A procedural approach to §5851(1) is required by the verb used in the critical sentence of that statute. The first sentence of §5851 employs the verb “bring.” The tolling principles provided in that statute are triggered when a party *brings* “an action under this act.” To *bring* an action means to institute or to file an action. The “bringing” of a cause of action refers to the *filing* of a cause of action, without any reference to the substantive predicate for such an action.

The verb used in the first sentence of §5851(1) is of considerable significance in attempting to determine if the analysis employed by the Court of Appeals was correct. To “*bring* an action

under this act," as §5851(1) provides, cannot be a reference to the substantive basis underlying the claim. It is, instead, a reference to what may be described as a purely "procedural" event, the filing (*i.e.*, the "bringing") of a cause of action. Giving full effect to the verb used in §5851(1) should lead this Court to the conclusion that the Court of Appeals seriously erred its interpretation of §5851(1). *cf Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004) (stressing the importance of the verb form used in MCL 500.3135(7) in the interpretation of that statute).

**II. THE ONE YEAR BACK RULE OF MCL 500.3145 CONSTITUTES A
"PERIOD OF LIMITATION" FOR PURPOSES OF MCL 600.5851.**

At the oral argument held before this Court on October 18, 2005, an issue was raised with respect to whether the "one year back" rule of MCL 500.3145 constitutes a "period of limitation" for purposes of §5851(1). In its February 2, 2006 Order, the Court has asked for supplemental briefs on the question of whether §5851 applies to the "one year back" rule of §3145. The language of the Court's February 2, 2006 Order is broad enough to encompass the issue which was first raised at oral argument. As a result, *amicus curiae* will address that question as well.¹

MCL 600.5851 specifies that where an injured party is disabled by insanity, that person will have one year after the removal of that disability to bring an action, "although the period of limitations has run." MCL 600.5851 clearly operates to toll a "period of limitation." The issue which was raised during the October 2005 oral argument concerns the interaction between the tolling effect of §5851 and the "one year back" rule of MCL 500.3145(1). That statute provides in relevant

¹The addressing of this question is complicated by the fact that the precise character of the defendant's argument on this point has not yet been proffered. Plaintiffs and their *amici* are, therefore, at some disadvantage in that they are being asked to "respond" to arguments which have not been formally presented in writing and will not be so presented until the defendant and its *amici* present their supplemental briefs.

part:

An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.

This Court has in recent years firmly advocated the literal interpretation of statutes. *See e.g. Roberts v Mecosta County General Hospital*, 466 Mich 57, 66; 642 NW2d 663 (2002); *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001) (If a statute's language is clear, "we assume that the Legislature intended its plain meaning, and we enforce the statute as written."); *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999). Employing such an analysis in this case should lead to the conclusion that each of the time limits provided in §3145(1), including that statute's "one year back" rule, are subject to §5851(1)'s tolling effect, since each represents a "period of limitations" for purposes of §5851(1).

This Court outlined the effect of §3145(1) in *Welton v Carriers Ins. Co.*, 421 Mich 571; 465 NW2d 170 (1985). There, the Court stated:

MCL 500.3145(1) . . . contains two limitations on time of suit and ***one limitation on period of recovery***:

- (1) An action for personal protection insurance (PPI) benefits must be commenced not later than one year after the date of accident, *unless* the insured gives written notice of injury or the insurer previously paid PPI benefits for the injury.
- (2) *If* notice has been given or payment has been made, the action may be commenced at any time within one year after the most recent loss was incurred.
- (3) Recovery is limited to losses incurred during the one year preceding

commencement of the action.

Id. at 576 (emphasis added).

The accuracy of the *Welton* Court's description of the effect of §3145(1) was recently reaffirmed by this Court in *Devillers v Auto Club Insurance Association*, 473 Mich 562, 574; 702 NW2d 539 (2005).

What should be apparent from the description of §3145(1) in both *Welton* and *Devillers* is that this statute is unquestionably a limitation; it limits the amount of plaintiff's recovery of no-fault benefits. Moreover, as *Welton* and *Devillers* also make clear, it is a limitation which is imposed based on a period of time - the one year period prior to the date of filing the plaintiff's Complaint. Thus, both *Welton* and *Devillers* establish the obvious -- that the one year back rule of §3145(1) is a "limitation on the period for which benefits may be recovered." 473 Mich at 574; 421 Mich at 576. The one year back rule of §3145(1) is, in a very real and very literal sense, a "period of limitation" to which §5851 must apply.

Nor does it matter for purposes of §5851 that the limitation imposed in §3145(1) may affect the *amount* of no-fault benefits which a plaintiff may recovery, not necessarily the entirety of plaintiff's recovery. Thus, the defendant cannot suggest that the "one year back" rule is not a period of limitation because it impacts on the scope of the plaintiff's remedy, as opposed to barring a claim for no-fault benefits altogether. Nearly 140 years ago Chief Justice Thomas Cooley described the essence of a statute of limitations as follows: "the idea of a statute of limitations is only this: that the *remedy* of the party is to be taken away because he is unreasonably negligent in the assertion of his rights." *Toll v Wright*, 37 Mich 93, 102 (1877) (emphasis added); *see also Austin v Anderson*, 279 Mich 424, 427; 272 NW 730 (1937); *Bement v Grand Rapids & Indiana Railway Co.*, 194 Mich

64, 68; 160 NW 424 (1916) ("the limitation of time for bringing suit is a limitation of the remedy only . . .").

As these cases have recognized, a period of limitations deprives the plaintiff of a remedy. That is precisely what the one year back rule of §3145(1) does. It limits the extent of the plaintiff's no-fault remedy. But, the fact that §3145(1) may not deprive plaintiff of the entirety of his/her cause of action for unpaid benefits does not mean that this statute is not a "period of limitation" for purposes of §5851(1).

It is anticipated that the defendant and its *amici* will to some extent rely in their supplemental briefs on the observations made by Justice James Brickley in *Howard v General Motors Corp*, 427 Mich 358; 399 NW2d 10 (1986). In anticipation of that argument, some discussion of Justice Brickley's decision in *Howard* is warranted.

Howard was a workers compensation case. The workers compensation statute contains a provision, MCL 418.381(2), which prohibits the payment of benefits for a period of time more than two years before the employee files an application for a hearing with the workers compensation bureau.² Thus, the Workers Disability Compensation Act contains a "two year back" rule on benefits.³

²MCL 418.381(2) provides:

Except as provided in subsection (3), if any compensation is sought under this act, payment shall not be made for any period of time earlier than 2 years immediately preceding the date on which the employee filed an application for a hearing with the bureau.

³The WDCA also contains a "one year back" rule which applies when workers compensation payments to the plaintiff have stopped and the injured worker requests additional benefits. That "one year back" provision is contained in MCL 418.833(1), another statute which was discussed in the *Howard* case.

The plaintiff in *Howard* filed a petition with the bureau on June 24, 1977. Thus, if the two year back rule of MCL 418.381(2) applied to that case, the plaintiff's award period would have begun, at the latest, on June 24, 1975. However, the defendant failed to raise the two year back rule at the hearing level. Based on that failure, the hearing referee awarded benefits to the plaintiff from the last date of the plaintiff's employment, July 13, 1973.

On appeal to the Appeal Board, the referee's award of benefits from the last day of plaintiff's employment was affirmed based on the defendant's failure to raise the two year back rule of MCL 418.381(2) at the hearing level. The Appeal Board reached this conclusion on the basis of this Court's decision in *Kleinschrodt v General Motors*, 402 Mich 381; 263 NW2d 246 (1978), and a later Court of Appeals decision, *Kingery v Ford Motor Company*, 116 Mich App 606; 323 NW2d 318 (1982).⁴

The issue presented to this Court in *Howard* focused on the questions of whether the two year period specified in MCL 418.381(2) could be or had been waived. Justice Brickley, in an opinion joined only by Justice Riley, addressed the legal question of whether the statutory two year period could be waived. Justice Brickley concluded that the two year period could not be waived and he would have reversed the Appeal Board's determination on that basis. Three other justices (Justices Boyle, Williams and Cavanagh) concurred in the reversal of the Appeal Board's ruling, but they did so on a purely factual ground - that, under the facts of the case, the defendant had never waived the "two year back" rule at all. *Howard*, 427 Mich at 388-389.

⁴In *Kleinschrodt*, this Court construed the one year limitation on the award of workers compensation benefits contained in MCL 418.833(2). There, the Court concluded that "the one-year back provision is a defense, akin to the statute of limitations, which cannot be waived." 402 Mich at 384.

Justice Brickley's opinion in *Howard* on behalf of himself and only one other justice is not precedentially binding. See *Negri v Slotkin*, 397 Mich 105, 109-110; 244 NW2d 98 (1976); *People v Warren*, 462 Mich 415, 427, n. 22; 615 NW2d 691 (2000). Moreover, in that opinion the Court was considering a different Michigan statute. Nevertheless, because of the potential overlap between Justice Brickley's analysis in *Howard* and the arguments which will be raised by the defendant in its supplemental brief, some consideration of Justice Brickley's reasoning in *Howard* is appropriate.

Justice Brickley came to the conclusion in his *Howard* opinion that the two year back rule of MCL 418.381(2) was a *substantive* limitation on the authority of the bureau to award workers compensation benefits, not a statute of limitations. Justice Brickley found support for this conclusion in the text of MCL 418.381(2) and MCL 418.833(2). According to Justice Brickley, "Both statutes address their proscriptions to the hearing referee or board; to prohibit the 'payment' or ordering of compensation for periods earlier than indicated." 427 Mich at 382.

Justice Brickley then cited several legal encyclopedias' definition of a statute of limitations, 427 Mich at 384-385, and he used these definitions to conclude that the one year and two year back rule found in the WDCA were not statutes of limitations:

Thus, relying on these very basic definitions of statutes of limitations, the one- and two-year-back rule statutes may not be so categorized. Simply stated, they are not statutes that limit the period of time in which a claimant may file an action. Rather, they concern the time period for which compensation may be awarded once a determination of rights thereto has been made.

* * *

The purpose of the one- and two-year-back rules is to provide notice to the employer and to prevent stale claims, *Fuchs, supra*; *White supra*. Although the rules do have the effect of penalizing claimants who have not timely pursued their claims, and while they *limit* an employer's unexpected liability for compensation, they do not relieve employers of the fear of litigation, nor do they prevent fraud or remedy the inconvenience of delay. *The rules do not perform the functions traditionally*

associated with statutes of limitations because they do not operate to cut off a claim, but merely limit the remedy obtainable. They don not disallow the action or the recovery - a petition may be filed long after an injury and benefits may be awarded in response thereto - they merely limit the award once it has been granted.

427 Mich at 385-386 (emphasis added).

Several observations regarding Justice Brickley's treatment of the issue presented in *Howard* are in order. First, Justice Brickley's reliance on the literal text of MCL 418.381(2) and MCL 418.833(2) to support his conclusion in *Howard* is not so easily translated to the statute under consideration here, §3145(1). According to Justice Brickley, the statutes at issue in *Howard* were substantive, not a procedural limitation period, because they were written in such a way that they operated directly on the power of the bureau to award benefits incurred prior to the time periods specified therein.

The accuracy of this observation is in doubt since the statute at issue in *Howard*, MCL 418.381(2), simply indicated that "payment shall not be made for any period of time earlier" than two years before the plaintiff's application was filed. There is nothing in the statute under consideration in *Howard* that expressed a substantive limitation on the bureau's authority to award workers compensation benefits.⁵ Thus, there is no language in MCL 418.381(2) which specifies that the bureau may not award damages to a litigant for any period more than two years after the case was instituted.⁶

⁵By providing that "payment shall not be made" for periods earlier than two years before the plaintiff's filing, MCL 418.381(2) can be more accurately described as a limitation on what a defendant is obligated to do, not a substantive limitation on the authority of the tribunal adjudicating that claim.

⁶As Justice Brickley himself acknowledged, his reading of MCL 418.381(2) as imposing a *substantive* limitation on the bureau's authority to award certain damages was directly at odds with this Court's description of the one year back rule in *Hlady v Wolverine Bolt Company*, 393

Similarly, the text of §3145(1) does not purport to limit a court's *substantive* authority to award unpaid no-fault benefits which are incurred more than one year before a complaint is filed. Instead, what §3145(1) states is that, "the claimant may not recover" benefits for the period more than one year before the case was filed. That statute does not operate on the *authority* of courts, forbidding them from awarding any benefits incurred more than one year before a complaint is filed. Thus, the text of §3145(1) does not operate as a substantive limitation on the authority of a court in the same manner as Justice Brickley described in *Howard*.⁷

The other serious error in Justice Brickley's analysis in *Howard* is his conclusion that the WDCA's two year and one year back provisions cannot be statutes of limitations because those statutes, "do not operate to cut off the claim, but merely limit the remedy available." 427 Mich at 386. In making this assertion, Judge Brickley is apparently suggesting that a statute of limitations must completely eliminate a plaintiff's cause of action, not merely limit the scope of the plaintiff's remedy.

This aspect of Justice Brickley's decision in *Howard* is flawed for reasons which have been discussed earlier. Contrary to Justice Brickley's conclusion in *Howard*, from very early on in Michigan law statute of limitations were viewed as limitations on a plaintiff's potential *remedy*. See

Mich 368; 224 NW2d 856 (1975). In *Hlady*, the Court described the WDCA's one year back rule as a "built-in statute of limitations." 393 Mich at 381.

⁷Moreover, if the Michigan Legislature ever created a statute which imposed a "substantive" limitation on the authority of a court to award certain amounts based on the date that a plaintiff files a formal claim requesting relief, such a statute would still raise the question of whether a "substantive" limitation of this type is still a "period of limitation" for purposes of §5851. A "substantive" limitation on the authority of a court to award certain damages, *when that "substantive" limitation is predicated on the date that the plaintiff's complaint was filed*, would still raise the question of whether such a limitation is, in fact, a "period of limitations" for purposes of Michigan's tolling statutes.

Toll, supra; Austin, supra; Bement, supra. Therefore, it is not essential that a "period of limitations" necessarily foreclose *all* recovery. It is enough that a statute limits the scope of the plaintiff's recovery based on the time that plaintiff initiated action on his/her claim.⁸

This point can be demonstrated in a significant body of federal law. Federal law contains several statutory provisions which limit the extent of a plaintiff's potential recovery based on a time period measured *backward* from the date the plaintiff's complaint is filed. For example, federal causes of action filed under the Fair Labor Standards Act (FLSA), 29 USC §201 *et seq*, allow for an award of back pay. That award is, however, limited to amounts incurred in the two year period before the plaintiff's cause of action was filed.⁹ See *Stanley v City of Tracy*, 120 F3d 179, 181 (9th Cir 1997); *Knight v Columbus, GA*, 19 F3d 579, 582 (11th Cir 1994); *Hamilton v 1st Source Bank*, 895 F2d 159, 165 (4th Cir 1990). There is no doubt in the applicable federal law that the statute on which the two year back rule of the FLSA is based is considered a statute of limitations. See 29 USC

⁸MCL 500.3145 has all of the hallmarks of a period of limitation because it (1) reduces the scope of the plaintiff's remedy, and (2) it reduces that remedy based on the date of the filing of the plaintiff's complaint. The "one year back" rule's characteristic as a "period of limitations" is bolstered when one considers another time limitation imposed in the no fault act which is clearly not a "period of limitation." The no fault act limits the amount of work loss benefits which an insured may recover to three years after the date of the accident. MCL 500.3107(1)(b). This is, quite clearly, a time limitation imposed on the scope of a plaintiff's remedy. But, it is a limitation which has no relationship to the timing of the filing of the plaintiff's complaint. The one year back rule of §3145(1) is, like all "periods of limitation" a limitation on the plaintiff's recovery based expressly on the timing of the filing of the complaint. To use the terminology which Justice Brickley employed in *Howard*, the three year rule of §3107(1)(b) is a *substantive* limitation imposed in the no fault act which applies to every case. The one year back rule of §3145 is fundamentally different precisely because it is tied to the date that the plaintiff's claim was filed.

⁹In cases involving a "willful violation" of the FLSA, the period for which back pay may be claimed is extended to three years back from the date that the plaintiff's complaint was filed. See 29 USC §255(a).

§255(a). The substantial body of federal law on this subject reinforces the fact that a statutory period, measured backward from the date that a complaint was filed, limiting the amount of the plaintiff's recovery, is just as much a "limitations period" as one which is measured forward from the date of the claim's accrual.

Finally, *amicus curiae* would note that the distinction which Justice Brickley would have drawn in *Howard* – between a substantive limitation on an award and a statute of limitations – harkens back to an earlier development in Michigan law on the subject of statutes of limitations. Beginning with its 1916 decision in *Bement v Grand Rapids & Indiana Railway Co.*, *supra*, this Court held that state tolling provisions would not be applicable to statutory causes of action in which the statute in question created its own limitations period. The reason for this conclusion rested in the notion that a limitations period provided in a statute which created the liability was "substantive." *See generally* Developments in the Law – Statute of Limitations, 63 *Harv. L. Rev.*, 1177, 1187-1188 (1950); *Lambert v Calhoun*, 394 Mich 197, 186-186; 229 NW2d 332 (1975). Thus, as expressed in *Bement*, a time period specified in a statute creating a cause of action "operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all." 194 Mich at 67.

This Court was to retain this view of a "substantive" statutory limitations period for many years. *See Holland v Eaton*, 373 Mich 34; 127 NW2d 892 (1964). However, this view of the law was abandoned by this Court in 1975 in *Lambert v Calhoun*, *supra*, where it held that the minority savings provision contained in §5851 would apply to a statutory cause of action, a claim under the Motor Vehicle Accident Claims Act. 394 Mich at 187-191.

The history of Michigan's treatment of limitations periods incorporated into statutory causes

of action appears comparable to the views expressed by Justice Brickley in *Howard* and, presumably, the views which will be advanced by the defendant herein. In both the *Bement* line of cases and Justice Brickley's decision in *Howard*, a statutory time limit has been given a "substantive" component. According to this Court in *Bement* and *Holland*, a statute's own limitations period was deemed "substantive," and thereby removed from the effects of the Revised Judicature Act's tolling provisions. In Justice Brickley's view in *Howard*, the WDCA's two year back rule is a "substantive" limitation on the authority of a tribunal, not a procedural rule subject to waiver.

This Court in *Lambert* did an effective job of exposing the analytical errors which led the Court to its prior decisions in *Bement* and *Holland*. As pointed out in *Lambert*, prior Michigan courts had failed to grasp the conflict of law origins of the rule announced in such cases as *Bement* and *Holland*. 394 Mich at 184-188. The Court in *Lambert* noted that these conflicts of law concerns were not applicable when, as in *Lambert*, the legislation under consideration was a Michigan statute. *Id* at 190.

For purposes of the issue to be presented to this Court with respect to §5851 and §3145, what is most significant is the discussion contained in the concluding pages of the *Lambert* opinion. There, the *Lambert* Court noted that, from a very practical perspective, there was no reason to believe that the Michigan Legislature, in enacting a limitations period within a statute which provided a right of action, intended that the tolling periods set out in the Revised Judicature Act would be inapplicable. The *Lambert* Court ruled:

There is scant reason for ascribe to a legislature an intent to distinguish between common-law and statutory causes of action in the application of saving provisions. This is especially without warrant in the application of domestic saving provisions to domestic statutory causes of action.

The need and desirability for saving in one case are the same as the other. *Infants or insane persons are under the same disability whether their actions be common-law or statutory; the defendant in one case is generally in no greater need than the defendant in the other of protection from delay in commencement of the action.* We are unable to distinguish the two cases or to ascribe to the Legislature such an intention.

394 Mich at 191 (emphasis added).

The observations made by the Court in *Lambert*, in putting to rest what was an antiquated rule of law deserve particular attention here. As this Court sets out to decide the meaning of the words "period of limitation" in §5851(1), the Court should keep in mind the observations made in *Lambert*. What this quotation from *Lambert* confirms is that infants and insane people are under the same disability in filing a cause of action in a timely manner, whether the timeliness of such is measured from the date of a claim's accrual or whether the timeliness is measured backward from the date of the filing of the cause of action.

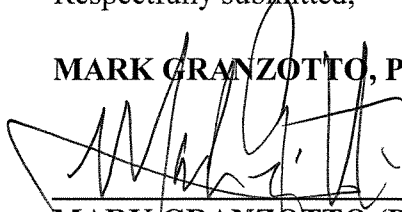
In other words, where the Michigan Legislature has imposed a limitation on an infant's or an insane person's right to recover based on the date that the complaint is filed, the same considerations which prompted the Michigan Legislature to adopt §5851 should apply to toll the "period of limitation".

RELIEF REQUESTED

Based on the foregoing, *amicus curiae*, The Michigan Trial Lawyers Association, respectfully requests that the Court reverse the Court of Appeals' July 13, 2004 decision, and remand this matter to the Washtenaw County Circuit Court for further proceedings.

Respectfully submitted,

MARK GRANZOTTO, P.C.

A handwritten signature in black ink, appearing to read 'Mark Granzotto', is written over a horizontal line.

MARK GRANZOTTO (P31492)

Attorney for *Amicus Curiae*

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Dated: March 14, 2006

STATE OF MICHIGAN
IN THE SUPREME COURT

DIANE CAMERON and JAMES CAMERON,
Co-Guardians of the Estate of Daniel Cameron,

Supreme Court No. 127018

Plaintiffs-Appellants,

Court of Appeals No. 248315

-vs-

Washtenaw County Circuit
Court No. 02-000549-NF

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF OAKLAND)

MARK GRANZOTTO, being first duly sworn, deposes and states that on the 14th day of
March, 2006, he mailed a copy of **BRIEF *AMICUS CURIAE* ON BEHALF OF THE**
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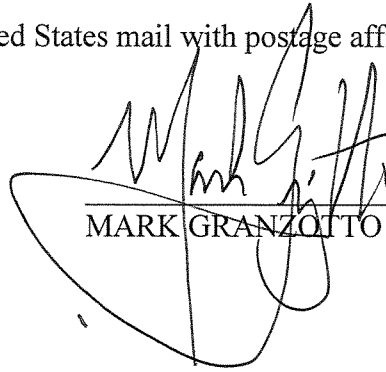
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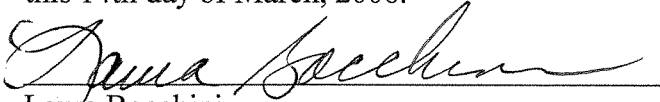
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by placing said documents in the United States mail with postage affixed thereto.

Further deponent saith not.


MARK GRANZOTTO

Subscribed and sworn to before me
this 14th day of March, 2006.



Laura Bocchini

Notary Public, Wayne County, MI

Acting in Oakland County

My commission expires: 07/26/07